Fordham Law Review

Volume 85 | Issue 5 Article 31

2017

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FAIRNESS BEYOND THE ADVERSARY SYSTEM: PROCEDURAL JUSTICE NORMS FOR LEGAL NEGOTIATION

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INTRODUCTION

The tale of the vanishing trial is, by now, familiar and well worn.[1] The arc and import of the narrative differ by teller: some decry the loss of an adjudicated outcome, either by judge or by jury,[2] and some praise the proliferation of alternative methods for dispute resolution that might allow for more flexibility and efficiency.[3] Either way, the decline in trials and adjudicated outcomes raises critical questions about the nature of the adversary system. The decline in trials has raised particular concerns in the criminal context, where "negotiated justice" has drawn a phalanx of critics.[4] Plea bargaining is susceptible to a negotiation analysis,[5] and understanding plea bargaining as an essential interpersonal interaction casts doubt on the idea that the criminal adversarial system enshrines the hallmarks of a just, neutral process, rooted firmly in the rule of law. In the civil context, though, worries are sometimes less acute: liberty is not at stake, the power differential may be less dramatic between the parties, and the private ordering

* Professor of Law, Washington University School of Law; Visiting Professor of Law, Harvard Law School, fall 2016. Thanks to Susan Appleton, Deborah Dinner, Matt Bodie, and participants in Fordham University School of Law's colloquium entitled *Civil Litigation Ethics at a Time of Vanishing Trials*, particularly Judith Resnik and Bruce Green, for helpful commentary and suggestions. For an overview of the colloquium, see Judith Resnik, *Lawyers' Ethics Beyond the Vanishing Trial: Unrepresented Claimants, De Facto Aggregations, Arbitration Mandates, and Privatized Processes*, 85 FORDHAM L. REV. 1899 (2017).

1. *See generally* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); Benjamin Weiser, *Trial by Jury, a Hallowed American Right, Is Vanishing*, N.Y. TIMES (Aug. 7, 2016), https://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html?_r=0 [https://perma.cc/SGE6-MV2L].

2. *See, e.g.*, Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (arguing against the "highly problematic" use of settlement to resolve most legal cases).

3. *See, e.g.*, Frank E.A. Sander, Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7–9, 1976), *reprinted in Varieties of Dispute Processing*, 70 F.R.D. 79, 111 (1976). *See generally* Gladys Kessler & Linda J. Finkelstein, *The Evolution of a Multi-Door Courthouse*, 37 CATH. U. L. REV. 577 (1988).

4. *See, e.g.*, Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1980–91 (1992) (discussing structural concerns in the plea bargaining context).

5. *See* Rebecca Hollander-Blumoff, *Getting to "Guilty": Plea Bargaining as Negotiation*, 2 HARV. NEGOT. L. REV. 115, 147–48 (1997).

at issue in these cases has been subject to a "market" type of analysis.[6] However, the shift from a system of public, adversarial, and ordered civil dispute resolution to a set of private, negotiated, and ad hoc resolutions has raised serious concerns about our enforcement of the laws and our understanding of legal outcomes.

The disappearance of adjudicated civil disputes shines a keen light on what we—as a society, as individuals, and as legal professionals—expect and want from so-called "private" ordering. This Article takes as fundamental premises (1) that laws and regulations play a vital role in our society and (2) that even in a system of largely nonadjudicated justice, law and legal rules should remain important in guiding the resolution of disputes in situations where those rules would otherwise apply.[7] Law and legal rules are our society's expression of justice; if we want outcomes to legal disputes that at least comport with justice, what does the absence of trials tell us about the optimal nature of negotiated justice? If justice is a key ideal for the resolution of legal disputes, how can lawyers best achieve outcomes that are not, at a minimum, at odds with the law? If we are negotiating, as I have argued in prior work, in the "shadow of legal process,"[8] what are the implications for the appropriate behavior of lawyers in an adversary system?

One key component of fairness and legitimacy for our legal system is procedural justice—the fairness of the process used to reach an outcome. Almost a half century of robust empirical research has clearly established the importance of procedural justice in how people assess the legitimacy of the legal system, leading to important judgments about adherence to decisions as

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6. For analysis using a market-based approach, see generally Maurits Barendrecht & Berend R. de Vries, *Fitting the Forum to the Fuss with Sticky Defaults: Failure in the Market for Dispute Resolution Services?*, 7 CARDOZO J. CONFLICT RESOL. 83 (2005); Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994); Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1 (1995). *But see* Fiss, *supra* note 2, at 1075 ("Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.").

7. By this, I certainly mean to exclude a category of "nonlegal" disputes—those for which law typically provides no basis for resolution. For example, I do not include an ordinary dispute between company executives as to whether they should introduce a new product into the market or a basic dispute between a couple as to whether or not to have children. But as the creative reader can imagine, of course, even these situations *could*, in unique circumstances, theoretically lead to a resolution governed by law. *See, e.g.*, *Coke-Flavor Suit Rejected*, N.Y. TIMES (June 21, 1985), http://www.nytimes.com/1985/06/21/us/coke-flavor-suit-rejected.html (discussing dismissal of a lawsuit seeking to force Coca-Cola to return "New Coke" to Coke's original formula) [https://perma.cc/JG8D-HG6K]; Gina Vivinetto, '*Modern Family' Star Sofia Vergara Sued by Her Own Frozen Embryos*, TODAY (Dec. 8, 2016), http://www.today.com/health/sofia-vergara-sued-her-own-frozen-embryos-t105728 (discussing a lawsuit brought purportedly by her own embryos, backed by her former fiancé, for deprivation of property due to not being born) [https://perma.cc/T9SN-PLSZ].

8. Rebecca Hollander-Blumoff, *Just Negotiation*, 88 WASH. U. L. REV. 381, 384–85 (2010) (noting that "individuals are bargaining in the shadow of this fair process—in the shadow, in essence, of due process—with the fairness of the process playing a critical role in individuals' experiences in legal dispute resolution negotiation").

well as compliance with laws and rules.[9] Although this research has mainly been conducted in areas involving either a third-party decision maker[10] or a government actor,[11] research has expanded in the last several decades to include more nontraditional settings such as the family,[12] the market,[13] and, most importantly here, legal negotiation in a civil dispute setting.[14]

Perceptions of procedural justice serve as important determinants of people's satisfaction with their experience in the justice system. In the courtroom, understanding what kind of process is fair is facilitated by a set of clear norms and rules that govern behavior. Judges oversee a formalized process, parties sit in designated spaces, and the courtroom itself offers cues about the role of the rule of law.[15] Yet, as fewer cases come to resolution through a judgment by a judge or a jury, the norms and rules of the courtroom are less reliable and available as an indicator of what process is fair or what benchmark by which to gauge fairness. When parties resolve their disputes through negotiation—in the shadow of the adversarial process but not directly within the adversary system—it is much harder to understand what process will leave participants with the perception of procedural justice. Shifting the burden of fair process from a neutral third party such as a judge or arbitrator onto lawyers creates an ethical challenge for attorneys. Should lawyers be responsible for creating a fair process for negotiating parties?

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9. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 161–62 (1990).

10. *See generally* Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483 (1988); E. Allan Lind et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224, 235–36 (1993); Jennie J. Long, *Compliance in Small Claims Court: Exploring the Factors Associated with Defendants' Level of Compliance with Mediated and Adjudicated Outcomes*, 21 CONFLICT RESOL. Q. 139 (2003); Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury*, 12 LAW & HUM. BEHAV. 333 (1988); Dean G. Pruitt et al., *Long-Term Success in Mediation*, 17 LAW & HUM. BEHAV. 313, 327 (1993).

11. *See generally* Aziz Z. Huq, Tom R. Tyler & Stephen J. Schulhofer, *Why Does the Public Cooperate with Law Enforcement?: The Influence of the Purposes and Targets of Policing*, 17 PSYCHOL. PUB. POL'Y & L. 419 (2011); Steven J. Schulhofer, Tom R. Tyler & Aziz Z. Huq, *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335 (2011); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513 (2003); Tom R. Tyler, *Enhancing Police Legitimacy*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 84 (2004); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231 (2008); Tom R. Tyler & Cheryl J. Wakslak, *Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority*, 42 CRIMINOLOGY 253 (2004).

12. *See generally* Mark R. Fondacaro, Michael E. Dunkle & Maithilee K. Pathak, *Procedural Justice in Resolving Family Disputes: A Psychosocial Analysis of Individual and Family Functioning in Late Adolescence*, 27 J. YOUTH & ADOLESCENCE 101 (1998).

13. *See generally* Harris Sondak & Tom R. Tyler, *How Does Procedural Justice Shape the Desirability of Markets?*, 28 J. ECON. PSYCHOL. 79 (2007).

14. *See, e.g.*, Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473, 478–79 (2008).

15. *See, e.g.*, Oscar G. Chase & Jonathan Thong, *Judging Judges: The Effect of Courtroom Ceremony on Participant Evaluation of Process Fairness-Related Factors*, 24 YALE J.L. & HUMAN. 221, 223–25 (2012) (discussing the "ceremonial" aspects of an American courtroom).

And, if so, how can they provide a fair process in negotiated settlement while retaining their role as zealous advocates in an adversary system?

Part I of this Article provides background on procedural justice and its relationship to negotiation. Part II then discusses the results of a recent empirical study that I conducted on the factors that help shape perceptions of procedural justice in the negotiation setting. Lastly, Part III explores the strategic and ethical implications of these results for the practicing lawyer in settlement negotiations.

I. PROCEDURAL JUSTICE AND NEGOTIATION

As noted above, research on the role of procedural justice in shaping reaction and adherence to decision-making processes is robust. The research demonstrates that people's views about their outcomes are shaped not solely by how fair or favorable an outcome appears to be but also by the fairness of the process through which the decision was reached.[16] A fair process provided by a third party leads to higher perceptions of legitimacy;[17] in turn, legitimacy leads to increased compliance with the law.[18] Procedural justice effects are important across legal and nonlegal settings. Several competing theories provide potential explanations of the reason for procedural justice's importance: some believe that fair process is valued because it is likely to lead to an accurate, fair outcome (the instrumental theory);[19] others believe that fair process sends a signal about one's value and worth with respect to the broader societal group (the group engagement theory);[20] and yet others believe that fair process provides a mental "heuristic," or shortcut, to assess one's outcome when other benchmarks are unavailable (the fairness heuristic theory).[21]

Despite the lack of a neutral third-party decision maker, research has suggested that procedural justice matters to people in the negotiation setting.[22] Even when individuals negotiate in a one-on-one context, procedural justice plays a significant role in shaping reactions to the negotiation outcome.[23] Additionally, research has suggested that even in the

16. *See generally* Casper et al., *supra* note 10; MacCoun & Tyler, *supra* note 10.

17. *See* TYLER, *supra* note 9, at 162.

18. *See id.*

19. *See generally* JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975).

20. *See generally* Tom R. Tyler & E. Allen Lind, *A Relational Model of Authority in Groups*, 25 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 115 (1992).

21. *See generally* Kees van den Bos et al., *How Do I Judge My Outcome When I Do Not Know the Outcome of Others?: The Psychology of the Fair Process Effect*, 72 J. PERSONALITY & SOC. PSYCHOL. 1034 (1997).

22. *See generally* Hollander-Blumoff & Tyler, *supra* note 14, at 477–79; Edward Kass, *Interactional Justice, Negotiator Outcome Satisfaction, and Desire for Future Negotiations: R-E-S-P-E-C-T at the Negotiating Table*, 19 INT'L J. CONFLICT MGMT. 319 (2008); E. Allen Lind, Tom R. Tyler & Yuen J. Huo, *Procedural Context and Culture: Variation in the Antecedents of Procedural Justice Judgments*, 73 J. PERSONALITY & SOC. PSYCHOL. 767 (1997).

23. *See* Hollander-Blumoff & Tyler, *supra* note 14, at 491 (finding that procedural justice plays a significant role in bilateral negotiations).

context of dispute resolution via negotiation in the civil legal context, individuals still care about the fairness of process.[24] Specifically, the more fair negotiators perceive the negotiation process to be, the more likely they are to believe that the agreement will be followed.[25] Participants playing the role of lawyers in one study were more likely to recommend a negotiated outcome to their clients, and to believe that the agreement formed the basis for a good, long-term solution, when the process was characterized as fair.[26]

Because research suggests that procedural fairness in negotiation plays a significant role in shaping potential attorney reaction to the outcome of a negotiation, the creation of a fair negotiation process by a lawyer is a critical piece of the negotiation "toolkit." Creating the perception of a fair process for the opposing counsel and party is useful if it will increase the likelihood of a recommendation of, and subsequent adherence to, a negotiated outcome. This raises the question, considered below, of what constitutes fair process in the negotiation setting. Research has focused previously on how individuals make assessments about what a fair process is, but most of that research occurred in the context of a third-party decision maker.[27] The following part considers the antecedent factors for judgments of fair process in the negotiation setting.

II. PROCEDURAL JUSTICE ANTECEDENTS IN NEGOTIATION

Decades of research have established that four major factors are at the heart of assessments of procedural justice: the opportunity to be heard; courteous and respectful treatment; trust in the motives of the decision maker; and the understanding that a neutral, unbiased rule of decision will be used.[28] Individuals value having a voice in the process, perhaps because they believe that sharing their side of a story will be important in ensuring a fair decision and perhaps because it demonstrates that the decision maker values their contribution.[29] Individuals care about being treated with courtesy and respect because it provides them with dignity.[30] Trust and neutrality are sometimes conflated and do have some conceptual overlap, but they can be distinguished by intent: trust relates to the parties' belief that a decision maker is motivated by the desire to be fair and accurate, while neutrality means that there is no bias (explicit or implicit) present and that a neutral rule is being used to determine the outcome of the conflict.[31]

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24. *See generally* Hollander-Blumoff, *supra* note 8 (discussing research showing that whether a negotiation is conducted fairly has an effect on how negotiation outcomes are perceived).

25. *See id.* at 384; Pruitt et al., *supra* note 10, at 327.

26. *See* Hollander-Blumoff & Tyler, *supra* note 14, at 491.

27. *See* Hollander-Blumoff, *supra* note 8, at 384; Lind, Tyler & Huo, *supra* note 22, at 768.

28. Tom Tyler & Steven L. Blader, *Justice and Negotiation*, *in* THE HANDBOOK OF NEGOTIATION AND CULTURE 295, 300 (Michele J. Gelfand & Jeanne M. Brett eds., 2004).

29. *See id.*

30. *See id.* at 301.

31. *See id.* at 300–01.

Yet these antecedents may not map perfectly on to the negotiation context, where no third-party adjudicator is present. On one hand, when two (or more)[32] lawyers are interacting, one can listen to the other and provide an opportunity to be heard, and be courteous and respectful in that interaction as well. On the other hand, when partisan advocates attempt to resolve a conflict, it would be the rare attorney who expects neutrality from the other party. Attorneys are consistently biased in favor of their own clients,[33] and our adversarial system of zealous advocacy not only expects that bias but typically demands it.[34] Similarly, trust in the motives of the other party seems less important here in the classic sense of expectations regarding the motive to reach the right outcome; lawyers may disagree strongly about the right outcome, largely based on the starting point of their own client. In this context, trust in the behavior of the attorney may be more relevant—is the attorney speaking truthfully (or at least, not violating professional rules of ethics for misleading statements),[35] and can the other lawyer trust that an agreement will likely be followed through on in the future?

In many other contexts in which procedural justice has been studied, deviation from a set of procedural rules may provide an easy way for participants to evaluate their voice, respectful treatment, neutrality, and trust by offering a benchmark for appropriate treatment. But rules in negotiation are few and far between. The Model Rules of Professional Conduct provide that lawyers should not make misleading statements of material fact in communication with another lawyer (including during negotiation),[36] but attorneys can disagree about what constitutes a "misleading" statement and what facts are "material."[37] The Comment to Rule 4.1 provides even less clarity by adding the following explanation as to what constitutes a "statement of fact": "Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category."[38] Beyond these so-called rules, requirements for negotiation behavior are few and far between.[39]

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32. For ease of discussion, I will refer to a dyadic negotiation between two lawyers throughout this Article, but I do not mean to exclude negotiations in which more than two parties are present from the scope of this Article.

33. *See, e.g.*, Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, 16 PSYCHOL. PUB. POL'Y & L. 133, 135 (2010).

34. MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2016). The requirement of "zealous" advocacy has not been unanimously embraced. *See, e.g.*, Paul C. Saunders, *Whatever Happened to 'Zealous Advocacy'?*, N.Y. L.J., Mar. 11, 2011, at 4 (discussing changes to the New York Rules of Professional Conduct that drop the language of "zeal").

35. MODEL RULES OF PROF'L CONDUCT r. 4.1.

36. *See id.* r. 4.1 cmt. 2; *see also* Hollander-Blumoff, *supra* note 8, at 403.

37. MODEL RULES OF PROF'L CONDUCT r. 4.1 cmt. 2.

38. *Id.*

39. For example, a party cannot use threats or duress. *See* Hollander-Blumoff, *supra* note 8, at 402.

In light of the lack of clear rules for behavior provided by law or codes of professional conduct, questions abound regarding what the appropriate behavior for attorneys in a negotiation setting looks like with respect to fairness perceptions. In a recent study, I explored the question of what factors lead to perceptions of fair process in this largely rule-free setting, empirically testing the origins of procedural justice judgments in legal negotiation.[40] The study considered procedural justice in negotiation by surveying and coding behavior of law students playing the role of attorneys in a negotiation over a contract dispute.[41] The students negotiated during a forty-five minute period, after they had both met with a "client" and researched the relevant legal doctrine to form an opinion about what might happen if negotiation was unsuccessful and the case proceeded, in this instance, to a hypothetical arbitration.[42]

The study looked at perceptions of fairness in several ways. First, individual participants in the role of attorney in a settlement negotiation were asked about the presence of a variety of behaviors related to procedural justice during the negotiation, as exhibited by themselves and by the other party, including voice, respect, neutrality, and trustworthiness.[43] Participants were also asked to rate fairness globally.[44] In addition, third-party coders watched videotapes of the negotiations and coded for specific behaviors that might be linked to particular procedural justice antecedent factors, such as interrupting (voice), contentious behavior (courtesy and respect), intentionally untruthful statements and unforced disclosure of potentially damaging information (trust), and the use of objective benchmarks such as legal cases, legal doctrine, industry standards, and potential arbitration outcomes (neutrality).[45]

The results of this study suggested that all four of the variables that were explored played a significant role in forming assessments of fairness in negotiation when looking solely at individuals' own assessments of the behavior in the negotiation.[46] However, there were some differences in the relationship between procedural justice and how individuals assessed themselves versus others.[47] For example, one's own courtesy and respect behavior and the other party's courtesy and respect behavior mattered to an individual's perceptions of procedural justice, but regression analysis suggested that one's own personal behavior in treating someone *else* courteously and respectfully was a more significant driver than one's courteous and respectful treatment *by* the other party.[48] Voice effects in both

40. *See generally* Rebecca Hollander-Blumoff, *Formation of Procedural Justice Judgments in Legal Negotiation*, 26 GROUP DECISION & NEGOT. 19 (2016).
41. *See id.* at 24.
42. *See id.* at 24–25, 40.
43. *See id.* at 25.
44. *See id.*
45. *See id.* at 26–29.
46. *See id.* at 35.
47. *See id.*
48. *See id.* at 35–36.

directions were also important in shaping perceptions of fair process.[49] With respect to trust, unsurprisingly, individuals' perceptions about the other party's trustworthiness were significantly related to assessments of fair process, but individuals' assessments of their *own* trustworthiness were less important.[50] Neutrality correlated with procedural justice judgments on its own, but in regression analysis with other factors, its importance diminished.[51] In sum, the study results suggest that courtesy and voice are the most important factors in a person's judgments about fair process in negotiation but that trust, and to a lesser degree, neutrality, also play a role.[52] Taken as a whole, the results suggest that interpersonal relational factors may be more significant than more structural behavior in terms of influencing perceptions of fairness.[53]

These results suggest that negotiators who want to create perceptions of procedural justice in negotiation would be well served to focus most explicitly on treating their counterparts with courtesy and providing them voice, with a meaningful but ancillary effort to act in a trustworthy manner and to appear neutral. But interesting findings that may relate to neutrality's role in negotiation demand further discussion. In particular, thinking about neutrality in negotiation, one might imagine that resorting to discussions regarding what might happen if an agreement is not reached could provide some neutral benchmark for discussion and that such a discussion might promote procedural justice perceptions. Similarly, discussion of legal doctrine, industry rules and standards, or specific language from the contract that was the subject matter of the dispute, might provide indicia of neutrality that in turn could lead to increased perceptions of procedural justice.

In contrast, though, discussion of potential outcomes in a third-party dispute resolution process (in this study, as noted above, that process was arbitration)[54] was significantly and *negatively* correlated with assessments of procedural justice, meaning that when parties discussed the potential outcome in arbitration during the negotiation, they found the negotiation process less fair.[55] Similarly, discussing the main legal doctrine relevant to the breach of contract case, substantial performance had a negative effect on one's own, but not the other party's, perceptions of fair process.[56] That is, when a negotiator talked about substantial performance, her own perception of the fairness of the negotiation process declined. Discussing industry standards and specific contract language between the parties had no effect on

49. *See id.*
50. *See id.*
51. *See id.* at 36.
52. *See id.*
53. *See id.*
54. For the purposes of this Article, I would argue that the significant differences in arbitration and litigation are less likely to play a role in changing the effects of procedural justice in the settlement negotiation, although that is certainly a question that merits empirical inquiry.
55. *See* Hollander-Blumoff, *supra* note 40, at 39–40.
56. *See id.* at 36–37 (noting that perceptions of procedural justice are influenced by one's perception of his or her own behavior).

assessments of fairness; industry standard discussions, though, were significantly and negatively related to negotiators' assessments of the neutrality of the negotiation as a whole.[57]

Before proceeding to a discussion about the implications of this research, a caveat is necessary. Importantly, there is not yet any empirical research on the relationship between the procedural justice perceived by the lawyer and the procedural justice perceived by the client; indeed, almost all procedural justice research in the legal setting has asked the principals, not the agents, about their perceptions of fair process. Additionally, the empirical research that has considered lawyers has not considered the relationship between the procedural justice perspectives of lawyers and those of clients. Given that much of negotiation takes place without clients present,[58] it is important to understand that connection in a more nuanced way. Do lawyers have the capacity to "check" fair process at the door and only report to their clients on the ways in which an outcome is or is not fair or favorable? Or is there a "pass-through" effect of fair process? The research highlighted above suggests the latter, given that lawyers appear to be more enthusiastic about recommending a settlement when they believe that the negotiation process has been fair.[59] When lawyers are more enthusiastic about a settlement, presumably they pass along this enthusiasm to the client, and there is likely to be a higher rate of acceptance of a negotiated settlement.[60] Although this effect has not yet been empirically tested, this Article proceeds on the assumption that fair process for a lawyer will have a "transitive" effect on the acceptance by the client so that higher procedural justice experienced by the lawyer will translate to higher procedural justice for the client.[61] Indeed, this is why the ethics of the lawyer vis-à-vis procedural justice in negotiation are particularly important. In the next part, I discuss the implications of this research on lawyers' perception of fair process for negotiation behavior.

III. IMPLICATIONS

Procedural justice may be an important consideration in negotiation for a variety of reasons. First, a lawyer may want to use procedural justice as part of her negotiation "tool kit," knowing that such treatment may be likely to lead to greater adherence to and acceptance of an agreement. And beyond the instrumental value of procedural justice, there is intrinsic value to individuals in having a fair process in negotiation, as suggested by the group

57. *See id.* at 31.

58. Recent research by Donna Shestowsky suggests that client satisfaction might increase if clients were present during negotiation; participants in a field study consistently ranked negotiating with clients present as one of the most appealing ways for a dispute to be resolved. Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L. REV. 637, 673–74 (2014).

59. *See* Hollander-Blumoff & Tyler, *supra* note 14, at 484.

60. *See* Hollander-Blumoff, *supra* note 8, at 426–27.

61. If procedural justice experienced by lawyers is, in fact, a "dead end," then this discussion is less relevant and the focus should shift to the procedural justice experienced by the client in the interaction with her attorney. It seems doubtful that any client would care, independently, about the fair process experienced by her hired agent simply on its own terms.

engagement model of procedural justice.[62] There is also broader societal gain because processes that are perceived as procedurally fair are also likely to increase perceptions of legitimacy of the legal system.[63] This potential effect on perceptions of legitimacy is of particular importance in a system of negotiated justice, where reliance on individual adherence to outcomes, rather than judicial oversight of outcomes, is especially relevant. These concerns all suggest the added value of a procedural justice approach to negotiation.

At the same time, however, substantive law matters. In their seminal and deeply influential work on bargaining in the shadow of the law, Robert Mnookin and Lewis Kornhauser argued that there was a strong role for substantive legal rules in negotiation over family law outcomes; essentially, individuals bargain in the shadow of legal endowments rather than with a blank slate of potential choices.[64] And Roger Fisher and William Ury argued forcefully in their book, *Getting to YES*, that reference to objective criteria—using some kind of external benchmark as indicia of legitimacy—is a key way to do well in negotiation.[65] Similarly, Fisher and Ury recommend the strategic invocation of the "best alternative to a negotiated agreement"—the BATNA.[66] A BATNA is what will happen if a negotiated agreement is not reached; in the case of a dispute for which there is an underlying legal basis for resolution, the BATNA is typically what will happen in court or at arbitration.

Thus, leading scholars have convincingly argued that substantive legal endowments, and what an adjudicator is likely to do if negotiation processes break down, are critical guideposts in negotiation practice. Additionally, negotiation scholarship and teaching have widely supported and adopted this viewpoint as negotiation "gospel."[67] But scholars have not previously considered the effects of resorting to a discussion of legal endowments, objective criteria, and BATNAs on procedural justice perceptions. My own study indicated that inclusion of such "neutral" legal indicators in a negotiation process had a significant, negative effect.[68] When parties in a negotiation refer to the potential arbitration outcomes that might result if negotiation is not successful, both parties' perceptions of fair process fall.[69] And when one party discusses the legal doctrine, her own perception of fairness falls.[70] My research, demonstrating the potential negative effect of

62. *See* Tyler & Lind, *supra* note 20, at 139–40.
63. *See* TYLER, *supra* note 9, at 162.
64. *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968–69 (1979).
65. ROGER FISHER & WILLIAM URY, GETTING TO YES 81–94 (1991).
66. *See id.* at 97–106.
67. For example, some commentary has suggested that the BATNA is the key to negotiation power. *See* Russell Korobkin, *Bargaining Power as Threat of Impasse*, 87 MARQ. L. REV. 867, 868–69 (2004).
68. *See* Hollander-Blumoff, *supra* note 40, at 39.
69. *See id.* at 39–40.
70. *See id.*

"law" on negotiation process fairness, thus suggests a thought-provoking puzzle in regard to the procedural justice issue for lawyers.[71]

My empirical results are unable to speak to the underlying reasons why invocation of legal norms negatively affects procedural justice perceptions. It seems plausible that negotiators who are most focused on what will happen in an adjudicated process are more likely to discuss that process. In that case, are those negotiators less effective in some way because of their preoccupation with that other process? Are they signaling a lack of commitment to the negotiation process that undermines perceptions of fairness by both parties? Does a negotiator's own focus on legal doctrine lead her to measure the fairness of a negotiation process against the norms of an (imagined) adjudicative "fair process" and leave negotiation to come up short in (imagined) comparison?

Regardless of the underlying mechanism for the result, if law matters, and yet lawyers' invocation of the likely adjudicated outcome during a negotiation may lead parties to conclude that a negotiation is less fair, what can lawyers do to overcome this paradox? I have long taught my negotiation students that an understanding of legal endowments is critical but that an extensive legal argument during a negotiation may be a waste of time, if not counterproductive. I explain that in our adversary system, it is highly unlikely that after such an exposition of the law—even a sound and persuasive one—the other party to the negotiation will say, simply, "That's right—you win." The nature of the adversarial system is that both parties will compete and there will be an outcome determined by a third-party neutral—highlighted perfectly by Justice Roberts's famous "ball-and-strikes" judge-as-umpire metaphor.[72] And this neutral third party is simply not present in a settlement negotiation. Both parties in a negotiation must agree for a settlement to occur. This means that effective negotiation behavior cannot center around legal argument in the same way that courtroom advocacy does; persuasive negotiation behavior must differ from the adversarial legal argument.

Legal disputes concern the rights and responsibilities of parties under a rule of law, and the lack of a neutral third party during negotiation should not be an invitation to jettison the importance of the law. The importance of legal rules may be even more significant in negotiations with considerable power and resource differentials. And yet a settlement negotiation typically represents a private ordering, without resort to an adjudicative outcome, that occurs for a variety of reasons that are outside the scope of this Article but presumably does provide some set of benefits to the parties. If parties are going to negotiate, and most of these negotiations will end the dispute, the balance between the need for the law to play a role and the extrajudicial

71. *See id.*

72. *See Roberts: 'My Job Is to Call Balls and Strikes and Not to Pitch or Bat,'* CNN (Sept. 12, 2005), http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/ [https://perma.cc/2Q28-FKXR]. Despite its place in popular imagination, this view has been criticized for many years by prominent scholars. *See generally* Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ANN. REP. A.B.A. 395 (1906).

nature of the process is paramount. We may rely on attorneys to "police" the boundaries of legal settlement to ensure that legal endowments are respected or, at least, traded off for other benefits.[73] And yet, in addition to distributive justice, people deeply care about the fairness of process, including in a negotiation setting.[74] Research on procedural justice suggests that individuals are expecting—or, at the least, find beneficial—a fair process that shadows the fair process they might get in an adjudicative setting.[75] But using legal endowments in a negotiation may promote the use of legal standards at the expense of providing a procedurally just process.

So what should an ethical lawyer do in light of this conundrum? Should lawyers resort to legal argument about what an adjudicative body might do in order to ensure that legal norms are not overlooked or ignored, despite the risk of negatively affecting the procedural justice of the negotiation? Or should they ignore legal arguments about the likely outcome in negotiation to demonstrate a commitment to the negotiation proceeding and avoid building mistrust that negatively affects procedural justice perceptions and, perhaps, ultimate adherence to the agreement?

Each option has considerable drawbacks. Ignoring the legal framework has both strategic and ethical implications. Leaving the potential adjudicated outcome out of the negotiation discussion eliminates an important negotiation tool—resorting to BATNA—that can help to ensure that an outcome falls within parameters set by law. The idea behind a BATNA is that no one should agree to any negotiated outcome that is not at least as good as or better than what he or she might receive if no agreement is reached.[76] That is to say, in a legal case, the *Getting to YES* paradigm advises that a negotiator should understand what the likely outcome at trial would be and should never settle for less than what that outcome would provide to the client. This is a way for negotiators to ensure that distributive justice is respected in a world outside of third-party adjudication.

Potential outcomes and legal standards can also serve as the "objective criteria" recommended by *Getting to YES* to help negotiate a favorable and fair outcome.[77] *Getting to YES* advises that objective criteria can shift the negotiation discussion from a battle of wills to a battle of norms and, ideally, shape the negotiation outcome against a backdrop of standards that can provide legitimacy.[78] Such objective criteria can include scientific standards, industry norms, and, in legal cases, legal precedent.[79] These criteria can be very helpful in persuading opposing negotiators of the reasonable basis for one's demands. And, similar to BATNA, the use of objective criteria can help ensure that a negotiated outcome fits within a range of distributively just

73. *See* Mnookin & Kornhauser, *supra* note 64, at 985–88 (discussing the role of lawyers in the dispute resolution process).
74. *See supra* notes 22–26 and accompanying text.
75. *See supra* notes 22–26 and accompanying text.
76. *See* FISHER & URY, *supra* note 65, at 100.
77. *See id.* at 81–94.
78. *See id.* at 82–84.
79. *See id.* at 85.

outcomes.[80] Yet, if their use is not conducive to a fair process, a lawyer may lose as much as she gains by bringing up objective criteria.[81]

One potential solution is to think expressly about the two negotiations all lawyers deal with—one with a client, the other with opposing counsel—as distinct enterprises for the purpose of using objective criteria and external benchmarking regarding a potential adjudicated outcome. Explicit discussion with one's own client regarding the external benchmarks by which to measure the negotiated outcome may be very important and may be less likely to cause a *client* to believe that the process of negotiation with the lawyer is procedurally unjust. This is, in part, because the kind of neutrality sought by a client may differ from the kind of neutrality that opposing counsel might seek. Once these benchmarks are developed and discussed with a client, there may be less need to resort to them expressly during the negotiation, at least in terms of what might be lost by failing to discuss them with opposing counsel. That is, as long as a lawyer has those benchmarks in mind *implicitly* during the negotiation, that may serve the goals of both not ignoring potential outcomes and not derailing the fairness of process of the negotiation.

Another solution—one that more clearly addresses the potential gap between a lawyer's procedural justice experiences in the negotiation and the client's experiences—could involve the judge's case management powers under Rule 16 of the Federal Rules of Civil Procedure.[82] Under Rule 16, a judge could mandate that clients attend negotiations,[83] which would first have the effect of making procedural justice concerns more directly connected to clients' experience in negotiation rather than potentially "lost" on their attorneys or perceived secondhand. Additionally, an explicitly judge-managed settlement conference, in which the judge discusses doctrine or precedent, might provide better indicia of neutrality for the purposes of procedural justice judgments for both clients and lawyers alike, as opposed to the behavior of an opposing counsel. This would allow a role for discussion of the law without its potential negative effects on procedural justice in negotiation.

Of course, involving the judge in this way also has drawbacks. If a judge mandated that parties attend negotiation, there could be enforcement problems if one party refused to comply. Additionally, attorneys might bemoan the lack of flexibility, not to mention constraint on negotiation tactics that would arise from a requirement of client presence.[84] And a judge-

80. *See id.* at 83.

81. Some negotiation teachers and scholars critical of this aspect of *Getting to YES* have decried the "objective" aspect of objective criteria for years as specious, arguing that these criteria were necessarily subjective and highly open to manipulation.

82. I am grateful to Judith Resnik for this helpful suggestion.

83. *See* FED. R. CIV. P. 16(a).

84. For example, a "good-cop/bad-cop" strategy in which the lawyer paints the client as a bad cop would be exceptionally hard to execute with the client present. Clients might also share information that attorneys would prefer to keep confidential or might bring emotion or anger into the negotiation in a way that could hamper the lawyer's effectiveness. Some of the agency benefits of hiring a lawyer might be lost in such a setting.

managed settlement, of course, would add a significant layer of cost, time, and formality to negotiation.

Because the effect of courtesy and respect on procedural justice is stronger than the effect of a discussion of the likely outcome, it may be that more research on procedural justice antecedent behavior could shed light on whether an emphasis on the other procedural justice antecedents might mitigate any potential negative effects of resorting to discussion of the likely adjudicated outcome. Also, my research suggests that the discussion of a legal case or precedent may have less effect on procedural justice than reference to a specific legal doctrine and that reference to an industry standard is less impactful than discussion of what will happen at arbitration.[85] What may account for this difference, although it is subtle, is that perhaps discussion of past legal cases may be more open to reasonably differing interpretation, but discussion and prediction of future decisions appears more partisan and extreme.[86] Additionally, lawyers may differ significantly in how they use legal doctrine in negotiation—while legal "argument" may be counterproductive both in fostering procedural justice and in effectiveness, perhaps there are other ways to deploy legal rules and principles in a more persuasive and less adversarial manner.

Another important caveat to this discussion is that legal negotiations differ significantly by type and nature. The research discussed above took place in the context of a fairly straightforward contract dispute between two relatively power-equivalent parties. In negotiations that involve more substantive personal or civil rights, power differentials between the parties, or other factors that may change the nature of the dispute, the role of using legal doctrine and potential adjudicative outcome may be quite different. Negotiations in cases that concern important potential legal precedent may also be uniquely situated with regard to procedural justice concerns. Similarly, multiparty negotiations and negotiations that involve the government may also be so distinct as to call for particular analysis.

CONCLUSION

Although the empirical research I have described above is subject to limitations, it suggests the importance of thinking extremely carefully about the use of legal precedent and legal prediction in legal negotiation. While such factors are the bread and butter of practicing attorneys in the midst of an adjudication, their use in negotiation may have unexpected and unplanned effects. Lawyers must take extra care to navigate the potential consequences of using legal rules if they also want to reap the benefits of procedural justice effects in their negotiation. Certainly, it seems as though it would be a tremendous dereliction of a lawyer's duty of zealous advocacy to fail to adequately use the law as a safety net to ensure that a negotiated outcome is not dramatically short of what the law might provide, even taking into

85. Hollander-Blumoff, *supra* note 40, at 39.

86. However, such parsing may be too fine in light of the complicated nature of video coding.

account differences in perception regarding the likely outcome in a court. But sensitivity to the impact that using the law and legal doctrine adversarially in a negotiation may have on procedural justice is warranted. There are psychological, systemic, and strategic reasons that lawyers should care about perceptions of procedural justice in negotiation. But procedural justice concerns must be balanced against the need to ensure that even when the potential "umpire" in our adversary system is sitting on the sidelines, we still find a way to respect the law and legal rules.